Office Supreme Court, U.S.
FILED
DEC 19 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-1027

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

AMBROSE H. LINDHORST
LINDHORST & DREIDAME
Attorneys for Petitioner
1200 American Building
Cincinnati, Ohio 45202
(513) 421-6630

COUNSEL OF RECORD:
James J. Slattery, Jr.

OF COUNSEL:
S. Robert Casper
CASPER & CASPER
1 North Main Street
Middletown, Ohio 45042
(513) 381-6096

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1480

QUESTION PRESENTED FOR REVIEW

May a state supreme court judicially determine that the comparative negligence statute adopted by that state's legislature is retroactive in its application and not apply that same standard of retroactivity to all cases pending before that court wherein the prospective application of the comparative negligence statute at the trial and intermediate appellate level resulted in the grant of a summary judgment by all defendants against the petitioner, without thereby denying the petitioner's right to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION	2
STATEMENT OF THE CASE	3
THE REASONS FOR GRANTING THE WRIT	4
ARGUMENT	5
CONCLUSION	8

APPENDICES:

A. Appeal from the Court of Appeals for Hamilton County	1a-2a
B. Entry of Supreme Court of Ohio Dismissing the Motion for an Order Directing the Court of Appeals to Certify its Record	3a
C. Opinion of the Court of Common Pleas, Hamilton County, Ohio, dated February 10, 1982	4a-10a
D. Decision of the Court of Appeals for the First Appellate District of Ohio dated March 2, 1983	11a-14a

CONSTITUTIONAL PROVISIONS, STATUTES, AND CASES:

United States Constitution: Fourteenth Amendment	2, 4

Page

UNITED STATES CODE, TITLE 28:

Section 1257 (3) 2

RULES OF THE SUPREME COURT OF THE UNITED STATES:

Rule 19 (1) 2

OHIO REVISED CODE:

Sections 2315.19 ..... 4, 5
2515.10 5
4511.01 7
4511.09 7
4511.11 7
4511.76 7
4511.99 7

CASES: Page

Carbone v. *Overfield*, (1983), 6 Ohio St. 3d 212, 451 N.E.2d 1229 6

Dickerhoof v. *Canton*, (1983), 6 Ohio St. 3d 128, 451 N.E.2d 1193 7

Enghauser Manufacturing Company v. *Eriksson Engineering, Ltd.*, (1983), 6 Ohio St. 3d, 451 N.E.2d 228 .. 4, 6

Haverlack v. *Portage Homes, Inc.*, (1982), 2 Ohio St. 3d 26, 442 N.E.2d 749 3

Page

Straub v. *Voss*, (1982), 1 Ohio St. 3d 182, 438 N.E. 2d 888 ..... 4, 5

Strohofer v. *City of Cincinnati*, (1983), 6 Ohio St. 3d 118, 451 N.E.2d 787 6

Viers v. *Dunlap*, (1982), 1 Ohio St. 3d 173, 438 N.E. 2d 881 ..... 4, 5

Wilfong v. *Batdorf*, (1983), 6 Ohio St. 3d 100, 451 N.E.2d 1185 ..... 3, 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

KERRY D. MORTON,

Petitioner,

v.

ARCH F. HILDEBRANDT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners prays that a Writ of Certiorari issue to review the judgment herein of the Supreme Court of Ohio, entered September 21, 1983.

OPINIONS BELOW

The Decision of the Court of Common Pleas of Hamilton County, Ohio, granting the motions for summary judgment on behalf of all defendants dated February 10, 1982, is printed in Appendix C hereto. The decision of the Court of Appeals for the First Appellate District of Ohio, under docket number C-820247, affirming the judgment of the Court of Common Pleas of Hamilton County, Ohio, dated March 2, 1983 is printed in Appendix D, attached hereto. The entry of the

Supreme Court of Ohio, dated Septembr 21, 1983, dismissing for want of a constitutional question the appeal from the decision of the Court of Appeals for the First Appellate District of Ohio, is printed in Appendix A attached to this petition. The entry of the Supreme Court of Ohio dismissing the motion for an order directing the Court of Appeals to certify its record dated September 21, 1983, is attached as exhibit B. The notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Ohio on December 19, 1983.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3). Rule 19 (1) of the Rules of the Supreme Court of the United States provides:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or fully measuring the Court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this Court."

CONSTITUTIONAL PROVISION

Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

On July 23, 1979, Robert P. Cornett, not a party to the litigation, was southbound on Columbia Road in Deerfield Township, Warren County, Ohio, approaching the intersection of Fields-Ertel Road. At that same time and place, the petitioner was westbound on Fields-Ertel Road. The stop sign controlling the westbound traffic on Fields-Ertel Road is located at Deerfield Township, Warren County, Ohio, on property owned by defendants Phillip K. Pope and Cathy J. Pope. This stop sign was hidden by foliage which had been allowed to grow in front of the stop sign. Additionally, substantially to the east of the intersection was a sign indicating only that there was an intersection ahead as opposed to the stop sign being ahead as mandated by regulations adopted by appropriate state statute.

Being on a highway with a speed limit of 55 miles per hour, the petitioner entered the intersection at which time a collision took place between the motorcycle he was operating and the pickup truck driven by Mr. Cornett. The petitioner has been in a coma since the date of the accident.

The governmentally related defendants responded to the petitioner's pleading by filing a motion for summary judgment on behalf of the county and township officials. These motions were grounded on both a doctrine of sovereign immunity and the contributory negligence of the petitioner and were granted. The nongovernmental defendants moved for summary judgment solely on the issue of the contributory negligence of the petitioner.

While on appeal, the Supreme Court of Ohio decided the case of *Haverlack* v. *Portage Homes, Inc.*, (1982), 2 Ohio St. 3d 26, 442 N.E.2d 749. The Supreme Court judicially abrogated the common law principal of Governmental immunity as it relates to negligent acts of Governmental employees, in the State of Ohio.

On August 3, 1983, after the memoranda relating to jurisdiction had been filed in the within cause in the Ohio Supreme Court, that Court issued its decision in the case of *Wilfong* v.

Batdorf, (1983), 6 Ohio St. 3d 100, 451 N.E.2d 1185. There the Court held in paragraph 3 of the syllabus:

> "No. 3. The principal of comparative negligence, consistent with the provisions of R.C. 2315.19, applies to all negligence actions tried after June 20, 1980, irrespective of when the cause of action arose, as part of the common law of Ohio. (*Viers* v. *Dunlap*, (1982), 1 Ohio St. 3d 173, 438 N.E.2d 881 and *Straub* v. *Voss*, (1982), 1 Ohio St. 3d 182, 438 N.E.2d 888), to the extent inconsistent herewith overruled."

The Trial Court specifically noted in its decision, attached hereto in Appendix C, that were the comparative negligence standard applied to the instant case as opposed to the contributory negligence standard, a different result would eventuate.

THE REASONS FOR GRANTING THE WRIT

The act of the Supreme Court of Ohio, dismissing the appeal from the affirmance by the Court of Appeals for the First Appellate District of Ohio of the dismissal by the Trial Court as to all defendants:

1. Is in conflict with the recent decisions of the Supreme Court of Ohio in *Wilfong* v. *Batdorf* and *Haverlack* v. *Portage Homes, Inc.*, as enlarged as to Governmental immunity in the case of *Enghauser Manufacturing Company* v. *Eriksson Engineering, Ltd.*, (1983), 6 Ohio St. 3d 31, 451 N.E.2d 228.

2. Effectively deprived the petitioner of his right to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

ARGUMENT

As readily appears from the Appendix, this cause concerns a claim for personal injuries against various defendants. Specifically, the petitioner contends that the respondents, individually or in concert, violated certain statutory obligations imposed upon them for the installation and maintenance of various traffic control devices and permitted a stop sign to become obstructed as a result of which the petitioner sustained serious injuries.

Since the Trial Court's ruling and the Appellate Court's affirmance thereof, broad and sweeping changes have occurred in the law of Ohio in general and as it applies to the instant case in particular. As the Trial Court noted in his opinion in granting the defendants' motions for summary judgment:

> "It the comparative negligence statute (2515.10 O.R.C.) covered this situation (which it does not), the plaintiff would have a justiciable claim against those moving for summary judgment."

It is to be noted that the Trial Court's ruling was on motion for summary judgment and was rendered on February 10, 1982. This matter has never been "tried".

On August 3, 1983, after the memoranda relating to jurisdiction had been filed in the within cause in the Ohio Supreme Court, that Court issued its decision in the case of *Wilfong* v. *Batdorf*, (1983), 6 Ohio St. 3d 100, 451 N.E.2d 1185. There the Court held in paragraph 3 of the syllabus:

> "No. 3. The principal of comparative negligence, consistent with the provisions of R.C. 2315.19, applies to all negligence actions tried after June 20, 1980, irrespective of when the cause of action arose, as part of the common law of Ohio. (*Viers* v. *Dunlap*, (1982), 1 Ohio St. 3d 173, 438 N.E.2d 881 and *Straub* v. *Voss*, (1982), 1 Ohio St. 3d 182, 438 N.E.2d 888), to the extent inconsistent herewith, overruled."

The Supreme Court of Ohio has also abrogated the common law concept of Governmental immunity which was asserted in the Trial Court as a bar to the petitioner's right to proceed against certain of the Governmental defendants. *Enghauser Manufacturing Company* v. *Eriksson Engineering, Ltd.*, (1983), 6 Ohio St. 3d 31, 451 N.E.2d 228. Specifically, and more to the point based upon the facts of this case, the Supreme Court of Ohio held in the case of *Strohofer* v. *City of Cincinanti*, (1983), 6 Ohio St. 3d 118, 457 N.E.2d 787, decided on August 3, 1983, that a municipality statutorily charged with keeping its streets open, in repair and free from nuisance, could not avail itself of the protection of sovereign immunity, for allegedly designing and placing traffic control devices in a manner which led to confusion to the motoring public, thus creating the nuisance.

Although both *Enghauser* and *Strohofer*, supra, deal with Governmental immunity as to municipalities and the Governmental defendants in the instant case are township trustees, county commissioners and a county engineer, the Court's stated purpose in abrogating the doctrine of Governmental immunity is clear:

> "It is clear from our decision, however, that we rejected the continued viability of the doctrine of sovereign immunity as a defense. We reach that result upon finding that attempts to apply the doctrine resulted in confusion and unpredictability in the law; that its application created unjust results; and that it was unnecessary because municipalities can protect themselves from liability in the same manner as private businesses". (*Id.* p. 21)

The same result had been achieved where sovereign immunity was asserted as a defense on behalf of a board of education for the negligence of one of its employees. *Carbone* v. *Overfield*, (1983), 6 Ohio St. 3d 212, 451 N.E.2d 1229.

It is reasonable to expect that the same rationale concerning

the abrogation of Governmental immunity will apply to township trustees, county commissioners and county engineers for their negligence and the negligence of their employees.

Further, in *Dickerhoof* v. *Canton*, (1983), 6 Ohio St. 3d 128, 451 N.E.2d 1193, the Supreme Court of Ohio extended a municipality statutory duty to maintain streets open, in repair and free from nuisance, to include the duty to keep the shoulder of the road in repair.

What can be a closer analogy than that to the statutory duty imposed by Section 4511.11 upon the county engineer and/or township trustees in the instant case? Section 4511.11 of the Ohio Revised Code provides in pertinent part:

> "(A) Local authorities in the respective jurisdiction shall place and maintain traffic control devices in accordance with the Department of Transportation Manual and specifications for a uniform system of traffic control devices, adopted under § 4511.09 of R.C. upon highways under their jurisdiction as are necessary to indicate and to carry out § 4511.01 to 4511.76 and 4511.99 of R.C., local traffic ordinances, or to regulate, warn or guide traffic."

It is clear that the posting of the intersection ahead sign and the obstruction of the stop sign were in violation of this section of the Ohio Revised Code and the duty to maintain the roadway free from nuisance.

CONCLUSION

It is respectfully submitted that when the Supreme Court of Ohio changes the law, the changes in the law should inure to the benefit of all petitioners presently before that Court if the change in law would change the result in the courts below. The failure to do so denies the petitioner of his right to Equal Protection and the Due Process of Law as mandated by the Fourteenth Amendment to the United States Constitution. It is respectfully submitted that the petitioner's writ should be granted.

Respectfully submitted,

AMBROSE H. LINDHORST
LINDHORST & DREIDAME
Attorneys for Petitioner
1200 American Building
Cincinnati, Ohio 45202
(513) 421-6630

COUNSEL OF RECORD:
James J. Slattery, Jr.

OF COUNSEL:
S. Robert Casper
CASPER & CASPER
1 North Main Street
Middletown, Ohio 45042
(513) 381-6096

APPENDIX A

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1983 TERM
City of Columbus.) To wit: September 21, 1983

No. 83-861

KERRY D. MORTON,

Appellant,

vs.

ARCH F. HILDERBRANT, et al.,

Appellees.

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX B

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1983 TERM
City of Columbus.) To wit: September 21, 1983

No. 83-861

KERRY D. MORTON,

Appellant,

vs.

ARCH F. HILDERBRANT, et al.,

Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled. COSTS:

Motion Fee, $20.00, paid by $20 James Slattery, Jr., $20 James L. Flannery.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX C

COUNTY OF HAMILTON
Court of Common Pleas
Cincinnati, Ohio 45202
February 10, 1982

Eugene Droder, Esq.
Attorney at Law
410 Provident Bank Building
630 Vine Street
Cincinnati, Ohio 45202

Timothy A. Oliver, Esq.
Assistant Prosecuting Attorney
313 East Warren Street
Lebanon, Ohio 45036

James J. Slattery, Esq.
Attorney at Law
1200 American Building
30 East Central Parkway
Cincinnati, Ohio 45202

James H. Scheper, Esq.
Attorney at Law
222 High Street, Suite 300
Hamilton Center Building
Hamilton, Ohio 45011

Re: Morton V. Hildebrandt
Case No. A-81-00845

OPINION

Gentlemen:

This matter is before the Court upon Motions for Summary Judgment filed on behalf of Warren County Engineer, Deer-

field Township Trustees, and Phillip Pope and Cathy Pope, together with relevant pleadings, affidavits, answers to interrogatories, deposition, memoranda and oral argument.

This action arose out of a collision between plaintiff's motorcycle and a truck at the intersection of Columbia Road and Fields Ertel Road. Plaintiff alleges in his complaints that defendants negligently maintained the roadway and or maintained a nuisance, all to plantiff's damage.

The specifics of plaintiff's allegations of negligence and nuisance brought out in the affidavits, interrogatories, and depositions, are that a stop sign at the intersection was obscured by foliage and that a sign located eastwardly of the intersection read "intersection ahead" rather than "stop ahead."

The movants each rely, at least in part, upon the defense of contributory negligence. Contributory negligence is a valid defense, obviously, in a negligence action, and can also be a valid defense in an action involving nuisance:

> "The learned discussion of Judge Cardoza . . . (dealt) . . . primarily with the proposition that contributory negligence is available as a defense to an action for nuisance based upon negligence . . ."
>
> • • •
>
> ". . . Nuisance as a concept of law has more meanings than one. The primary meaning does not involve the element of negligence as one of its essential factors . . . One acts sometimes at one's peril. In such circumstances, the duty to desist is absolute, whenever conduct, if persisted in, brings damages to another . . . He is not to do such things at all, whether he is negligent or careful. . . . Other situations there are, however, where what was lawful in its origin may be turned into a nuisance by negligence in maintenance." (*Taylor* v. *Cincinnati;* 1944; 143 OS 426; 18 00 369, at page 375).

It is evident from the pleadings and affidavits, etc., that the nuisance in this case arises out of defendants' alleged

negligence in the maintenance of signs and trimming of bushes – that, therefore, the claim of nuisance herein is susceptible to the defense of contributory negligence

We must next determine whether plaintiff was guilty of contributory negligence as a matter of law.

The basic facts pointing to negligence on the part of plaintiff are those asserted in the affidavit of Robert P. Cornett, attached to the Motion for Summary Judgment filed on behalf of the Commissioners of Warren County:

> "1. . . . accident on July 23, 1979, at approximately 2:15 p.m. . .
>
> "3. . . . he observed Morton's motorcycle travel through the posted stop sign at an excessive rate of speed and crash into his pickup truck . . .
>
> "5. Those vehicles traveling on Fields-Ertel were required to stop at the designated stop signs, at the intersection itself, there are stop signs posted at the northeast and southwest corners . . .
>
> "6. The intersection itself is flat with good visibility for traffic from any direction.
>
> "7. . . . visibility was good, and the weather conditions were fair.
>
> "8. The roadbed was in good condition, with no cracks or holes necessitating repair . . ."

The facts presented by plaintiff to counter the assertions are primarily those set forth in the affidavit of Dale Morton:

> "4. . . . the only sign east of the intersection was a sign designating that there was an intersection ahead.
>
> "5. . . . there was no sign indicating that . . . westbound traffic . . . would have to come to a stop at that intersection.
>
> "6. . . . the intersection was not readily observable from a position back from the intersection."

"7. . . . foliage obstructed the stop sign . . . and could not readily be seen."

From the foregoing it may be assumed, for purposes of these motions, that the decedent traveled through the stop sign at the intersection and hit a truck; that the intersection was not readily observable; that the stop sign could not readily be seen because of foliage.

The bare-bones allegations of the affidavits do not state at what speed the decedent was traveling ("excessive" being a conclusion, not a fact under Civil Rule 56E); nor how far back from the intersection the sign warning of an intersection was placed; nor whether the decedent passed such warning sign; nor where the foliage was that obstructed the stop sign or whose foliage it was. However, it is clear that decedent traveled through a stop sign and crashed into a truck. We read as follows in *State* v. *Ray;* (1958); 79 OLA 528, at page 531:

> "'It is the court's opinion that sec. 4511.43 R.C. is a positive and specific rule of conduct passed by the Legislature of the State of Ohio to govern the conduct of motorists in using the highways . . .'"

In *Lehman* v. *Westhaven,* (1967; 10 0A 2d 66; 39 OO 2d 133) we read at page 135:

> "The defendant in failing to stop in obedience to the stop sign before entering the intersection violated the statute (Section 4511.43, Revised Code), and his failure to stop was a continuing violation to the point of collision."

It is, therefore, clear that plaintiff's decedent was acting negligently at the time of the collision – unless the presence of foliage making the stop sign and intersection not readily seen implies otherwise.

On the latter point we read the following:

"A motorist is not excused from disregarding a stop sign at an intersection by the fact that a 'defense barrel' had been placed so as to obstruct his view of such sign as he approached (*Franz* v. *Levine;* 1943; 72 O.A. 280; 27 OO 119; headnote)

"A motorist approaching an intersection should in the exercise of reasonable care anticipate that a sign might be hidden and not proceed until he had learned the fact" (*Ibid,* page 120)

"A municipality may, by ordinance, designate a main thoroughfare, provided legible and approximate signs are properly erected along the intersecting roads; but after such compliance the main thoroughfare does not lose its status merely because a sign on an intersecting road becomes illegible or is destroyed." (*Connors* v. *Dobbs;* 1945; 77 OA 247; 32 OO 552; headnote # 1)

"Dobbs knew that Hawkins Avenue south of Market Street was a main thoroughfare, but claims he did not know such to be the case north of Market Street . . .

". . . there was . . . no stop sign . . .

". . . the place where the collision . . . occurred was within the intersection of two improved streets . . .

"Plaintiff Connors, possessed of knowledge that Hawkins Avenue was a main thoroughfare, had a right to rely on that knowledge and upon his preferential right to proceed uninterruptedly across . . . intersection . . .

"Dobbs, under these circumstances, was by law required to stop before entering the intersection, and his failure so to do was negligence."

"A proper sign having been erected, Dobbs was charged with knowledge of the designation of Hawkins Avenue by ordinance as a main thoroughfare, even in the then absence of a stop sign . . ." (*Ibid,* page 553).

" '. . . a motorist involved in a collision at an intersection with an automobile approaching from the left on an

> arterial highway can not be heard to say that he did not know of the existence of the stop sign or that he could not see it . . .'"
>
> "It being established by the great weight of authority that Flannery did not have the right of way at the intersection of Robinson Avenue and Offnere Street, and that he was bound by law to know this, when he testified that he did not stop and did not look to his left and that he did not observe any traffic on Offnere Street going either way, when in fact if he had looked he would have seen the car approaching and entering the intersection on the arterial street, his testimony at least raised a presumption of negligence . . . and the burden was cast upon him to dispel that presumption . . ." (*Flannery* v. *Tessaromatis;* 1949; 91 OA 215; 48 OO 335, at page 339).

In the instant case, there is no evidence that plaintiff's decedent knew what kind of road he was traveling, whether or not he was in fact aware of the intersection or the stop sign, whether he passed or saw the sign warning of an intersection. However, this much is clear from the cases above cited: the driver of the truck had the right of way; the decedent, because a stop sign was posted, was presumed to know that he was not traveling on a thoroughfare.

Most importantly, the evidence before the Court is that because of the foliage the intersection was "not readily observable" and the stop sign "could not readily be seen." However, what is not readily seen or observable is nonetheless seeable and observable. The plaintiff cannot be heard to say that decedent did not see what was seeable; or if he be heard to say that, he cannot deny decedent's negligence in ignoring what he saw.

The affidavit of Robert P. Cornett recites that the stop sign was "not observable from the west." This statement, taken as true because not contradicted, is nonetheless irrelevant because the decedent was traveling in an eastwardly direction.

Plaintiff argues that the sign preceeding the intersection

read "intersection ahead" rather than "stop ahead." This fact, if accepted as true, does not change the fact that decedent did not see the stop sign.

Plaintiff further argues that the following statement in *Royce* v. *Smith* (1981; 68 O.S. 2d 106) should defeat the summary judgment motions:

> ". . . we hold that a complaint . . . seeking to impose liability on the township trustees for their alleged negligence in failing to maintain a stop sign located on a township road states a claim upon which relief can be granted" (Pg. 114).

This statement does not conflict with the decisions discussed above. The *Royce* rationale did not address itself to the issue of contributory negligence, which defense is applicable in the instant matter for the reasons already given.

It is certainly arguable that those responsible for the existence of foliage allegedly partially obscuring the stop sign were negligent and shared responsibility for the collision. If the comparative negligence statute (2315.19 O.R.C.) covered this situation (which it does not), then plaintiff would have a justiciable claim against those moving for summary judgment.

In view of the foregoing it is clear that plaintiff's claim is barred because of the contributory negligence of plaintiff's decedent.

Wherefore summary judgment is awarded each movant.

This matter is continued to February 24, 1982, 1:00 p.m. for entry. Please include *all* parties in the caption of the entry or entries.

Sincerely,

/s/ THOMAS H. CRUSH,
Judge

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-820247

KERRY D. MORTON,
Plaintiff-Appellant,

vs.

ARCH F. HILDEBRANDT, CARL BRADSTREET, and ROBERT L. TURNER, COMMISSIONERS OF WARREN COUNTY

and

CRAIG R. PENDLETON, WARREN COUNTY ENGINEER

and

DEERFIELD TOWNSHIP TRUSTEES

and

PHILLIP K. and CATHY J. POPE,
Defendants-Appellees.

DECISION.

(Filed March 2, 1983)

Messrs. Lindhorst & Dreidame, James J. Slattery, Jr., of counsel, 1200 American Building, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Messrs. Rendigs, Fry, Kiely & Dennis, Michael E. Maundrell, of counsel, 900 Central Trust Tower, Cincinnati, Ohio 45202, for Defendants-Appellees, Arch F. Hildebrandt, Carl Bradstreet, and Robert L. Turner, Commissioners of Warren County,

Mr. Timothy A. Oliver, 313 East Warren Street, Lebanon, Ohio 45036, for Defendant-Appellee, Craig R. Pendleton, Warren County Engineer,

Messrs. Baden, Jones, Scheper & Crehan Co., L.P.A., James H. Scheper, of counsel, 300 Hamilton Center Building, Hamilton, Ohio 45011, for Defendants-Appellees, Deerfield Township Trustees,

Messrs. Droder & Miller, Eugene Droder, of counsel, 410 Provident Bank Building, Cincinnati, Ohio 45202, for Defendants-Appellees, Phillip K. and Cathy J. Pope.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the oral arguments of counsel.

The matter *sub judice* arose from a collision between appellant's motorcycle and a truck at the intersection of Columbia and Fields-Ertel Roads. Appellant filed a complaint alleging that the accident was the result of appellees' failure to properly maintain the roadway and seeking to recover damages for injuries he had sustained. The trial court granted summary judgment for appellees on the basis of appellant's contributory negligence. Appeal was timely filed, with appellant's single assignment of error contending that the trial court erred in granting summary judgment for appellees.

The record shows that Columbia Road runs north-south and Fields-Ertel Road runs east-west. Columbia is a through road, but Fields-Ertel traffic is required to stop before entering the intersection. Stop signs are located at the intersection's northeast and southwest corners. The affidavit of the driver of

the truck (not a party to the litigation) reveals that on July 23, 1979, he was southbound on Columbia Road at a speed of approximately forty miles per hour. When he reached the intersection of Columbia and Fields-Ertel Roads, he saw appellant's motorcycle, approching from the east, go through the stop sign posted on Fields-Ertel Road and crash into his truck. The investigating police officer's affidavit states his conclusion that the accident was caused by appellant's running of the stop sign. The affidavit further states that the intersection is flat and that on the day of the accident the visibiliy was good.

Based on his father's affidavit, appellant has argued that his failure to stop at the intersection was caused by his inability to see the stop sign which was allegedly obscured by foliage; he contends that appellees are liable for his injuries because they did not properly maintain the sign. We cannot agree. Appellant's father's affidavit concedes that at the time of the accident there was a sign on Fields-Ertel Road east of the stop sign designating an "Intersection Ahead."[1] No allegation was made that this sign was obscured. Thus, assuming *arguendo* that appellant could not see the stop sign, he still had ample warning that he was approaching an intersection. We accordingly find that appellant was contributorily negligent as a matter of law in failing to yield the right of way at an intersection to a vehicle approaching from the right. R.C. 4511.41; *Lay* v. *Cahill* (1950), 154 Ohio St. 49, 93 N.E.2d 289; *Bevilacqua* v. *Mack* (3rd Dist. 1951), 92 Ohio App. 63, 109 N.E.2d 565.

As the trial court properly granted summary judgment, the

---

[1] Phillip Pope, on whose property the stop sign was located, stated by deposition that the sign east of the intersection designated a "Stop Ahead." In determining whether summary judgment is proper, the evidence must be construed in favor of the party opposing the motion. Thus, we will only consider the statement in appellant's father's affidavit.

assignment of error is overruled and the judgment below affirmed.

KEEFE, P. J., BLACK and DOAN, JJ.

PLEASE NOTE:

The court has placed of record its own entry in this case on the date of the release of this Decision.